

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32

BRUNDAGE-BONE CONCRETE PUMPING, INC.

Employer-Petitioner²

and

Case 32-RM-788

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 3, AFL-CIO

Union

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to Sections 8(b)(7)(C) and 9(c) of the Act and Section 102.77 of the Board's Rules and Regulations, an election by secret ballot was conducted on July 19, 2004, in a unit of all full-time and regular part-time concrete pump operators and mechanics employed out of the Employer's Exeter, California facility, including former employees who (A) have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election or (B) have had some employment in the 12 months preceding the payroll eligibility date and who have been employed for a total of 45 days or more in the 24 months preceding the payroll eligibility date; excluding employees who have been terminated for cause or who have quit voluntarily prior to the completion of the last job on which they were employed, office clerical employees, salespersons, estimators, managers, guards and supervisors as defined in the Act.

The Tally of Ballots served on the parties after the election showed that of approximately 15 eligible voters, none cast ballots for and 14 cast ballots against the Union. There were no void ballots and no challenged ballots. Thereafter, the Union filed

¹ Hereinafter referred to as the Board.

² Hereinafter referred to as the Employer.

timely objections to the election, a copy of which was served on the Employer by the Region. The objections state as follows:

1. The employer, by its agents, made promises of benefits to those eligible voters who would vote against the union and/or made promises of benefits to all eligible employees as an inducement not to vote for the Union and/or promised benefits if the Union lost the election.
2. The above-named employer, by its agents, threatened to close the facility and/or to take other retaliatory measures if the Union won the election.
3. The above-named employer, by its agents, interfered with, restrained and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.
4. The employer, by its agents, made material misrepresentations regarding National Labor Relations Board proceedings.
5. The employer, by its agents, altered National Labor Relations Board documents in a manner calculated to mislead employees regarding the neutrality of the National Labor Relations Board, thereby interfering with the laboratory conditions necessary for the conduct of a fair election.
6. The employer, by its agents, informed employees that if they selected the Union to represent them, bargaining with the Union as their representative would be futile.
7. The employer, by its agents, assigned employees more onerous working conditions because of their support for their Union.
8. The employer, by its agents, questioned and polled employees regarding their support for the Union during the pre-election period.
9. The employer, by its agents, including third parties, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election.
10. The employer violated Section 8(a)(1) of the Act and 8(a)(3) of the Act by telling employees they would not be hired because of their affiliation with the Union.
11. The employer violated Section 8(a)(3) by not hiring employees because of their affiliation for the Union.
12. The employer threatened employees with physical harm.
13. The employer threatened organizers with physical harm.

14. The employer denied Union representatives access to the NLRB election procedures by not permitting them to participate in the pre-election conference and not allowing them to attend the ballot count.

Acting pursuant to Sections 102.69, 102.78, and 101.23 of the Board's Rules and Regulations, Series 8, as amended, the undersigned caused an investigation of the objections to be conducted and, based on that investigation, rules as follows.

Objections 1, 4, 5, 7, 8, and 9

By letter dated July 21, 2004, the Region advised the Union that by August 2, 2004, it must submit the specific factual basis for each of its objections, as well as the names of witnesses who could provide relevant testimony in support of each objection. See *Heartland of Martinsburg*, 313 NLRB 655 (1994). The Region's letter further advised the Union that failure to comply with the foregoing would result in its objections being overruled. Notwithstanding those requirements, the Union has failed to submit the specific factual basis for each of the above objections and to identify supporting witnesses, and no representative of the Union has requested an extension of time to provide such evidence. Accordingly, I am overruling Objections 1, 4, 5, 7, 8, and 9. *Star Video Entertainment L.P.*, 290 NLRB 1010 (1988).

Objection 10

In support of this objection, which alleges that the Employer unlawfully told employees that they would not be hired because of their affiliation with the Union, the Union presented evidence showing the following: In late May, an individual approached the Employer's project manager, Darin Sawyer, at the Employer's Fresno, California jobsite, to ask whether the Employer was hiring. In response, Sawyer is alleged to have asked the individual if he was a Union member and to have told him that the Employer would not consider Union members for employment. Sawyer denies the incident. However, even assuming that it occurred, the Union has made no showing that Sawyer's alleged conduct was disseminated to any potential voters. Rather, the only individuals claimed to have been exposed to that conduct are the alleged job applicant, who, as discussed below with respect to Objection 11, was not unlawfully denied employment and, thus, would not have been a potential voter, and a Union staff member who, it is

claimed, overheard the exchange between Sawyer and the applicant while engaged in picketing at the jobsite. Thus, given the absence of evidence that any eligible voters were exposed to or aware of Sawyer's alleged misconduct, it could not have influenced the results of the election. Accordingly, I am overruling Objection 10.

Objection 11

This objection parallels the Union's unfair labor practice charge in Case 32-CA-21490-1, wherein the Union alleged that the Employer violated Section 8(a)(3) and (1) of the Act by refusing to hire the individual at issue in Objection 10. Under *FES*, 331 NLRB 9, 12 (2000), the finding of a discriminatory refusal to hire requires, among other things, a showing that the Employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct. Applying *FES*, the Region, on August 27, 2004, dismissed the charge in Case 32-CA-21490-1, because the investigation in that case disclosed that the Employer had no open positions and was not seeking job applicants at the time the individual in question allegedly approached Project Manager Sawyer to request employment. The Region's decision not to issue complaint regarding that allegation precludes the further consideration of that issue here, for, in the absence of a complaint, the Board will not consider unfair labor practice issues, especially those involving Section 8(a)(3) of the Act, in objections proceedings. See *Texas Meat Packers*, 130 NLRB 279 (1961). Accordingly, I am overruling Objection 11.

Objections 2, 3, 6, and 12

In support of these objections, which allege that the Employer threatened to close its facility and/or take other retaliatory measures if the Union won the election;³ interfered with, restrained, and/or coerced its employees; informed them of the futility of selecting the Union as their bargaining representative; and threatened employees with physical harm; the Union presented testimony showing the following: In July, prior to the election, Project Manager Sawyer, while driving near the Employer's jobsite, sped past a group of four union pickets in what the Union claims was a threatening manner. Three of the pickets were Union organizers; the fourth was employed by a company other than the Employer. After driving by, Sawyer returned to where the four pickets were standing and, according to the Union's testimony, spontaneously announced to them that the

³ No evidence was presented with respect to the alleged threat of facility closure.

Employer would never recognize the Union and would terminate any employee he found talking to a Union representative. Although Sawyer denies these allegations, I need not resolve that dispute, for, even assuming the Union's evidence to be true, no evidence was presented to show that any eligible voter knew of Sawyer's alleged conduct prior to the election. Absent such a showing, that conduct could not serve as a basis for setting aside the election. Accordingly, I am overruling Objections 2, 3, 6, and 12.

Objections 13 and 14

In support of these Objections, which allege that the Employer threatened Union organizers with physical harm and denied them access to the pre-election conference, the Union presented testimony showing the following: On the day of the election, about two hours before the pre-election conference was scheduled to begin, Union Representative Eric Quiles telephoned Project Manager Sawyer to ask whether Quiles would be allowed access to the Employer's premises so as to participate in the conference. Sawyer allegedly responded by telling Quiles that it would be better if he did not attend, because he might get hurt if he came onto the Employer's premises. Sawyer acknowledges that Quiles called him on the afternoon of the election to ask if he would be permitted to attend the pre-election conference, but Sawyer denies threatening Quiles. Rather, Sawyer asserts that he merely told Quiles that he would get back to him after checking with the Employer's attorney. Five minutes later, he called Quiles and left him voice-mail messages advising that he could in fact attend the pre-election conference. Quiles, who initially failed to disclose to the Region that he received those voice-mail messages, later conceded receiving them.

In considering the foregoing, I note as an initial matter that pre-election conferences are not required by the Board's rules. See *Eisner Grocery Company*, 116 NLRB 976, 978 (1956); *Interboro Chevrolet Company, Inc.*, 113 NLRB 118 (1955). In any event, however, the Union has made no showing that the threat attributed to Sawyer had any adverse impact on the pre-election conference or, more significantly, on the election itself. The alleged threat's potential effect, if any, on Quiles' decision whether to attend the pre-election conference was promptly mitigated by Sawyer's call-back messages. Thereafter, the Union did not bring the alleged threat to the Region's attention prior to the election. Indeed, the Union never contacted the Region regarding the pre-election

conference, even though the Board agent assigned to conduct the election had left a message with the Union two days before the election inquiring as to whether anyone on its behalf planned to attend the conference. Thus, it is at best speculative as to whether Quiles ever planned on attending the conference, even absent Sawyer's alleged threat. However, even assuming that Quiles otherwise would have attended, no showing has been made as to any adverse consequences to the election resulting from his non-attendance. Moreover, no evidence was offered to show that any potential voter was aware of Sawyer's alleged threat to Quiles.

In sum, I find that Sawyer's alleged threat to Quiles does not constitute a basis for setting aside the election. Accordingly, I am overruling Objections 13 and 14.

Having overruled all of the Union's election objections, I hereby issue the following:

CERTIFICATION OF RESULTS

Pursuant to the authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of valid votes cast in the election have not been cast for any labor organization, and that no labor organization is the exclusive collective bargaining representative for the employees in the bargaining unit set forth below:

All full-time and regular part-time concrete pump operators and mechanics employed by the Employer from its Exeter, California facility; excluding office clerical employees, salespersons, estimators, managers, guards and supervisors as defined in the Act.

DATED AT Oakland, California, this 31st day of August, 2004.⁴

/s/ Alan B. Reichard

Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

⁴ Under the provisions of Section 102.78 of the Board's Rules and Regulations, the Regional Director's rulings on the Union's objections in this matter shall be final unless the Board grants special permission to appeal them. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied on. The party requesting review shall immediately serve a copy thereof on each other party. A request for review shall not operate as a stay of the Regional Director's ruling unless so ordered by the Board.